

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

In Re:)	Case No. 96-30487
)	Chapter 13
ANDREW MARION BARTLEY and MARY)	
KATHERINE METCALF BARTLEY,)	
)	
Debtors.)	
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ORDER

This matter comes before the Court on Cabarrus Bank's ("Cabarrus") Objection to Confirmation of the Debtors' proposed Chapter 13 Plan. Cabarrus, a judgment creditor of the Debtors, objects to the Debtors' proposed Chapter 13 plan based on an alleged lack of good faith under 11 U.S.C. 1325(a)(3) and feasibility under 11 U.S.C. 1325(a)(6). A hearing was held on the matter on May 14, 1996 in Charlotte, North Carolina. Based on that hearing and after a review of the record, the Court enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. In 1995, the Debtors filed a Chapter 7 Bankruptcy case in the Middle District of North Carolina. In that case, Cabarrus objected to the dischargeability of its debt under 11 U.S.C. 523 (a)(2), asserting that the debt owed it by these debtors was incurred by their fraud and not subject to discharge. After a hearing where the Debtors appeared before that Court and admitted that they had no defense to Cabarrus' claims, on April 4, 1996, the presiding Bankruptcy Judge entered Default Judgment in favor of Cabarrus, both as to the debt and its nondischargeable nature.

2. On March 14, 1996, and while their Chapter 7 case was still ongoing, the Debtors filed a second bankruptcy case but in this District and this time under Chapter 13, attempting what is euphemistically known as a "Chapter 20" filing.

3. In their Chapter 7 case the debtors received a discharge from the Bankruptcy Court in the Middle District, which eliminated all but two of the Bartley's unsecured debts: Cabarrus' nondischargeable debt of \$42,906.45 and a debt of \$80,452.57 owed to Deutsche Financial. The latter obligation had been reaffirmed only months before by the debtors in the Chapter 7 case. The Debtors have made no payments on this debt since it was reaffirmed.

4. In their new case, the Debtors' proposed Chapter 13 plan contemplates a minimal payout on the two remaining unsecured creditors, estimated to be 10% - 22% (depending on the results of a pending valuation hearing) over a period of fifty months.

5. Cabarrus argues that the refiling of bankruptcy while the other case was pending, coupled with the Plan's minimal payout on these two nondischargeable (in Chapter 7) debts, shows a lack of good faith. The Debtors on the other hand assert that the discharge provisions in Chapter 7 and Chapter 13 differ, that these debts are dischargeable in the present Chapter 13 case, and it is appropriate to refile to treat these claims.

CONCLUSIONS OF LAW

In order to be confirmed, a Chapter 13 Plan must be proposed in good faith and not proposed by any means forbidden by law. 11

"Good Faith" is not a defined term under the Bankruptcy Code, nor in the legislative history thereto. However, whether a Plan has been filed in good faith is one of the most frequently litigated issues in bankruptcy practice.

In the Fourth Circuit, good faith is a fact driven issue: ". . . [T]he totality of circumstances must be examined on a case by case basis in order fairly to apply the statute" Deans v. O'Donnell, 692 F.2d 968, at 972 (4th Cir. 1982). The Deans decision suggests a list of factors which are germane to the question of good faith. These include: (1) the percentage of the proposed payout, (2) the Debtor's financial situation, (3) the time period of the proposed repayments, (4) the debtor's employment history and prospects, (5) the nature and amount of unsecured claims, (6) the debtor's past bankruptcy filings, (7) the debtor's honesty in representing facts, and (8) any unusual or exceptional problems facing the particular debtor. Id.

In another Section 1325(a)(3) case entitled Neufeld v. Freeman, 794 F.2d 149 (4th Cir. 1986), the Fourth Circuit provided an additional factor which is relevant to the current case. There the Court stated, " . . . although the discharge of an obligation which would be nondischargeable in Chapter 7 is not, standing alone, a sufficient basis on which to find bad faith or deny confirmation, it is a relevant factor to be considered in the section 1325(a)(3) inquiry." Id. at 152.

Based on the facts presented in the current case, it appears that this Chapter 13 plan has not been proposed in good faith as required by the Code. Several factors suggest this result.

First, this is a repeat filing, following on the heels of a Chapter 7 case brought in another District. Repeat filings are not per se bad faith under Section 1325(a)(3), but as the Deans case holds, past filings are relevant to whether the debtor is proceeding in good faith in the second case.

Some parties have read the Supreme Court's decision in Johnson v. Home State Bank, 111 S.Ct. 2150 (1991) as authority for "Chapter 20" filings such as the Debtors' filing in this case. However the Johnson decision specifically states that it does not deal with the issue of whether Chapter 20 cases violate the good faith standard of 11 U.S.C. § 1325(a)(3). 111 S.Ct. at 2150. Johnson simply addresses whether an in rem lien surviving a Chapter 7 bankruptcy case is a "claim" for purposes of inclusion in such a subsequent Chapter 13 bankruptcy.

In fact, most authorities consider a refiling without evidence of changed circumstances to be a factor indicative of bad faith. London, Chapter 13 Bankruptcy, 2nd Ed. (1994), Section 5.19 , p.5-29. In this case, no changed circumstances exist as the refiling is on top of the first petition.

Second, one must consider the nature of these debts, the percentage of the proposed payout, the time period of the proposed repayments, and the purpose of the bankruptcy. Here, apart from

attempting to write down the secured debt on the Debtors' residence, the sole purpose of this refiling is to discharge the two unsecured debts left over from the first bankruptcy. One of these debts was a nondischargeable debt for fraud. Under Neufield, a refiling to deal with a nondischargeable debt is suggestive of bad faith.

The only other unsecured debt treated to be in this case was only recently reaffirmed. The Debtors have made no payments to the creditor on this debt since reaffirmation. The refiling of a Chapter 13 case to alter the terms of a reaffirmed debt is indicative of bad faith under 1325 (a)(3):

The immediate refiling of a Chapter 13 case to change the terms of a reaffirmation agreement raises difficult "good faith" questions for the Debtor to answer. If little time has past between the reaffirmation agreement in the prior Chapter 7 case and the filing of the Chapter 13 case, the Debtor will have difficulty convincing the Court that the Debtor ever intended to perform the reaffirmation agreement. The Debtor faces the argument that it is bad faith to cherry pick creditors by reaffirming certain debts and discharging others in the Chapter 7 case, all with the intent of filing a Chapter 13 case to manage the preferred claims. The Chapter 7 creditors that were not beneficiary to the reaffirmation agreements are precluded from participation in the subsequent Chapter 13 case by the Debtors voluntary decision to reaffirm a particular debt. Most Courts easily conclude that good-faith analysis includes consideration of why the Debtor chose to reaffirm some debts and not others and the effect of those voluntary decisions." London, 5.19 at 5-31.

The scenario described by Judge London in his treatise is precisely the situation presented in this case.

As to the amount and term of repayment, the Debtors' Plan proposes only a nominal repayment, of 10% to 22%, over a period of time less than the statutory maximum term for a Chapter 13 plan.

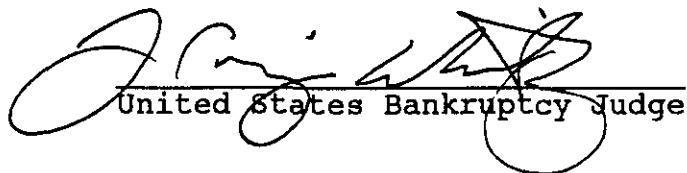
As noted, the issue of good faith is a factual determination. One cannot simply conclude that a refiling, a "Chapter 20" case, will in all cases be bad faith. However, in the instant case, where several of the Deans factors are present, it appears that the Plan has not been proposed in good faith. The Plan cannot be confirmed.

In its objection, Cabarrus also objected to feasibility of the Debtors' plan. In finding this plan not to be filed in good faith, this argument need not be considered.

THEREFORE, THE FOLLOWING IS ORDERED:

Cabarrus' Objection to Confirmation of the Debtor's Chapter 13 plan is sustained based on the Debtors' failure to satisfy the good faith requirement of section 1325(a)(3) of the Bankruptcy Code. The Debtors will have ten (10) days from the date of this Order to file a modified plan, otherwise confirmation will be denied and the case dismissed.

This is the 24th day of June, 1996.


United States Bankruptcy Judge